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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ISAAC HAMMOND,

Petitioner

versus

RAPIDES PARISH SCHOOL BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Respondent's failure to afford the Petitioner due process, and its racially discriminatory action in demoting the petitioner following a school board hearing on the Petitioner's alleged willful neglect of duty and incompetence, entitle the Petitioner to compensatory and punitive damages as well as reinstatement to his former position in accordance with the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution, and 42 U.S.C. §§1981, 1983 et seq.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
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RAPIDES PARISH SCHOOL BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Isaac Hammond, through undersigned counsel of record, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of

Louisiana, Alexandria Division, is unreported and appears herein as Appendix A, pp. A1-A31. The opinion of the Fifth Circuit Court of Appeals is also unreported, and appears herein as Appendix B, pp. B1-B4. The Fifth Circuit's denial of rehearing is appended as Appendix C, pp. C1-C2.

JURISDICTION

The district court's judgment in favor of Respondent and dismissing Petitioner's suit was entered on July 23, 1984. The Fifth Circuit Court of Appeals affirmed on February 11, 1985. The petition for rehearing and suggestion for rehearing en banc was denied on March 13, 1985. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Due Process and Equal Protection clauses of the Fourteenth Amendment of the United States Constitution provide as follows:

AMENDMENT 14

> Section 1. Citizens of the United States
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The petitioner also relies upon the prohibitions established by 42 U.S.C.

§1981 and 1983, which provide, in pertinent part: 42 U.S.C. §1981:

> **Equal rights under the law**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983:

> **Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the depriva-

> tion of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Louisiana's Teacher Tenure Act, L.S.A.-R.S. 17:443, is also relevant to this case. The text of that statute appears as Appendix D pp. D1-D4.

STATEMENT OF THE CASE

The petitioner, Isaac Hammond (hereinafter "Petitioner"), brought suit for pecuniary and injunctive relief against his employer, the Rapides Parish School Board (hereinafter "Respondent"), following a September 9, 1982, public hearing on charges of incompetence and

willful neglect of his duty as principal of Lincoln Road Primary School. The charges stemmed from a May 12, 1982, incident in which certain Lincoln Road Primary School students were not present for a skills proficiency test implemented by the Parish as directed by the Louisiana State Department of Education. These students were scheduled for a May 20, 1982, make-up examination.

The charges were first brought to Petitioner's attention during an August 5, 1982, informal meeting with school administration officials. During June and July, 1982, unbeknownst to Petitioner, these officials were conducting an investigation of charges and consulting with the Parish District Attorney concerning formal charges.

On August 10, 1982, the Superintendent recommended that Petitioner be dismissed from his employment for willful neglect and incompetence. Petitioner received formal notice of the charges by letter dated August 11, 1982.

During the September 9, 1982, hearing, Petitioner denied removing the students. He indicated that he interpreted Board policy to require testing only of those students who were to be promoted to a higher grade and that the testing arrangements were not among his responsibilities as principal (TT. pp. 212-213; Defendant's Exhibit 3). He also pointed out that he had tutored several of the non-participating students in preparation for the test and that he had arranged a make-up examination (Plaintiff's

Exhibit 13). The Parish Director of Elementary Education testified that scheduling the make-up fulfilled Petitioner's obligations (TT. p. 436).

Witnesses Turnage and Pitka, first grade teachers at Lincoln Road, testified that some of their students were removed from the tested group at the direction of Petitioner. Mr. Hammond denied ordering Ms. Turnage to exclude certain students. Ms. Pitka testified that her students were removed by an aide, Ms. Dorsey, on Mr. Hammond's instructions. Ms. Dorsey denied removing the students or receiving such instructions from Petitioner (TT. pp. 241, 244). Mr. Hammond noted that he had recommended remedial instruction for Turnage and Pitka to improve their teaching skills prior to the

May 12, 1982, incident. He indicated that he had always adhered to Board testing policy (TT. pp. 213).

The school board subsequently voted by a majority of six (6) to three (3) to remove Petitioner as principal of Lincoln Road Elementary School. All members of the board were of the Caucasian race. Petitioner was subsequently assigned to teach at a local junior high school at a considerably reduced salary, with concomitant embarrassment and damage to his professional and community reputation.

This disposition of Petitioner's 22 years of service as a Parish educator with no performance complaints was in harsh contrast with the punishments for misbehavior received by Caucasian princi-

pals disciplined by Respondent, as described herein and shown at trial.

ARGUMENT

In addition to the specific reasons certiorari should be granted discussed herein, Petitioner respectfully calls to the Court's attention the fact that racial discrimination in the public schools of Louisiana has been an historically significant problem, and has necessitated extensive litigation. The struggle for equal rights for black students, teachers, and administrators is not over yet. Only by court mandate have the Louisiana school systems accepted desegregation of student bodies, Singleton v. Jackson Municipal School District, et al., 419 F.2d 1211 (5th Cir. 1969), rev'd on other grounds 396 U.S. 290, rehearing

denied 396 U.S. 1053, later app. 426 F.2d 1364, mod. 396 U.S. 226, cert. denied 402 U.S. 944 (1971); Valley v. Rapides Parish School Board, 499 F.Supp. 490 (W.D. La. 1980), aff'd in pert. part 646 F.2d 925 (5th Cir. 1981), on remand 653 F.2d 941, cert. denied 455 U.S. 939 (1982); desegregation of school faculties and staff, Cornist v. Richland Parish School Board, 495 F.2d 189 (5th Cir. 1974), disapproved on other grounds 421 U.S. 240 (1975), aff'd in pert. part 517 F.2d 1032; see also the many cases cited at annotation, "Racial Discrimination in the Hiring, Retention, or Assignment of Teachers - Federal Cases", 3 A.L.R. Fed. 325; and equitable voting requirements enabling fair representation of minorities in school board elections, Parnell v.

Rapides Parish School Board, 563 F.2d 180 (5th Cir. 1977), rehearing denied 568 F.2d 1367, cert. denied 438 U.S. 915 (1978); Stewart v. Parish School Board of the Parish of St. Charles, 310 F.Supp. 1172 (E.D. La. 1970), aff'd 400 U.S. 884 (1970).

Petitioner respectfully urges that cases, such as this one, of discrimination against just one black man may not initially appear to be of sufficient merit and magnitude to justify certiorari; however, it is by this gradual, practically imperceptible process of subverting justice for the individual that unconstitutional discrimination against an entire race is accomplished, and previous judicial prohibitions of such practices undermined.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH PRIOR AUTHORITY OF THIS COURT

Petitioner's Due Process Rights Were Violated

In the September 9, 1982, hearing, the school board relied upon the uncorroborated testimony of two biased witnesses, Turnage and Pitka, in finding Petitioner guilty of the alleged misbehavior. There was no other evidence to support its decision. Several witnesses indicated that Petitioner had not committed the infractions. It was undisputed that, despite any wrongdoing in initially withholding the students, Petitioner had fulfilled his obligations by arranging a make-up examination.

In reaching this decision, Respondent failed to rely upon substantial evidence of guilt, and its determination was with-

out a rational basis. This is contrary to law. Jones v. Jefferson Parish School Board, 533 F.Supp. 816 (E.D. La. 1982), affirmed 688 F.2d 837 (5th Cir. 1982), rehearing denied 691 F.2d 502, cert. denied 460 U.S. 1064 (1983). Thus Petitioner was not afforded due process.

In affirming the board's decision, the appellate court erred in giving great weight to the board's determination, the usual rule in an appellate proceeding. Because the district court has not, unlike the usual trial of a case, observed the demeanor and credibility of witnesses directly, the appellate court must exercise independent review of the facts and law without the usual deference to recognition and weight of determinations by the trial court. In Re Dowden, 446 So.2d 853,

855 (La. App. 2nd Cir. 1984), cert. denied 450 So.2d 954 (La. 1984). This procedure also denied Petitioner of due process.

Additionally, it is apparent from the district court's decision that the court was persuaded by the evidence of Petitioner's improper "actions and attitude" and "lack . . . of loyalty." (Findings of Law, Appendix A, p. A36). Respondent did not cite or adjudicate Petitioner for his "attitude," teaching philosophy, or loyalty. It was improper for the court to base its decision on "generalized findings of guilt." See State ex rel Franceski v. Plaquemines Parish School Board, 416 So.2d 150, 154 (La. App. 4th Cir. 1982), cert. denied 421 So.2d 907 (La. 1982). In so doing, Petitioner's due process rights were further violated.

In the recent decision of Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487 (Mar. 19, 1985), this Court clarified the ambits of due process a public employee is entitled to of right prior to termination of his employment. The Court cited well-settled authority for the requisites of a pretermination hearing, notice, and an opportunity to respond. The Court acknowledged the value of permitting an employee the opportunity to present his side of the case so as to avoid erroneous termination and the economic, social, and emotional burdens of unemployment, with minimal disruption of the employer's operations. The Court expressed a clear preference for pretermination rather than post-termination proceedings, in the interest of justice and efficiency in the workplace.

The manner in which Respondent conducted Petitioner's hearing did not comply with state law, or federal standards of due process as expressed in Loudermill. In addition to the deficiencies previously cited, the record will show that, contrary to the Teacher Tenure Act (Appendix D), and federal law, Petitioner did not receive in advance complete, detailed, and specific written charges and the names of proposed witnesses and others involved in the charges. Failure to provide notice is a blatant violation of basic due process, and further impermissibly violates an accused's due process rights by truncating his opportunity to respond.

Further, Petitioner was entitled to a pretermination rather than post-termination hearing under the Teacher

Tenure Act, and for the reasons presented in Loudermill. It is evident from the manner in which this hearing was conducted and the fact that a covert investigation had been conducted for nearly three (3) months prior to the hearing that the formal proceedings were a pretense. Respondent had unilaterally investigated, brought charges, and reached its decision long before the formal hearing. The hearing was, in a real sense and in terms of its constitutional merit, post-termination, and impermissibly so.

Petitioner Was The Victim Of Racial Discrimination

As previously stated herein, Petitioner asserted at trial that his termination (with subsequent demotion and reassignment) was motivated by racial discrim-

ination, and pointed out that two Caucasian principals who had committed similar wrongdoings were not penalized at all. One of them received a warning letter in his personnel file and the other was not charged or prosecuted.

In McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), this Court found racial discrimination and liability therefor under Title VII of the Civil Rights Act of 1964 on similar facts. In McDonald, a black employee and two white employees were charged with misappropriation of their employer's property. Both white employees were discharged. The black employee was not discharged. Comparing the McDonald facts to those in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a Title VII suit for wrongful

discrimination in re-employment, this Court held that dismissal based upon commission of a crime may be justifiable, but not where it is a pretext for discrimination. McDonald, supra, at 281. This Court quoted from McDonnell as follows:

> . . . On remand, [the former employee] must . . . be afforded a fair opportunity to show that [the employer's] stated reason for [the former employee's] rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against [the employer] of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. [The employer] may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

McDonald, 427 U.S. at 282, emphasis added, quoting from McDonnell, 411 U.S. at 804.

The McDonald opinion also contains the following point which is relevant to the instant matter:

> . . . (Defendant) contends that petitioners were required to plead with "particularity" the degree of similarity between their culpability in the alleged theft and the involvement of the favored coemployee, Jackson.... Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in McDonnell Douglas, an allegation that other "employees involved in acts against [the employer] of comparable seriousness ... were nevertheless retained ..." is adequate to plead an inferential case that the employer's reliance on his discharged employee's conduct as grounds for terminating him was merely a pretext.

Id. at 284. Footnote 11.

The acts of principals Thigpen and Gill did not occur at the same time and place as Petitioner's alleged misbe-

havior, but they are indisputably of comparable seriousness. It is further noteworthy that Thigpen and Gill admitted wrongdoing while Petitioner maintains that he is innocent, and that, like Gill, Petitioner's supposed infraction occurred on only one occasion and was remedied by him. Thigpen's violation of federal copyright law, which had the potential for exposing Respondent and other parties to liability for damages, occurred repeatedly and persisted despite warnings. Yet, only Petitioner was punished, and severely.

Surely these facts raise an inference that the alleged misconduct of Petitioner was a pretext for termination of his employment by Respondent.

Petitioner established a prima facie case of racial discrimination (Con-

clusions of Law, Appendix A p. A26). Respondent was thereafter obliged to prove that the termination was for legitimate, nondiscriminatory reasons. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). The reasons must be clear and reasonably specific. Id. at 259. Petitioner submits that the testimony of two biased witnesses, Turnage and Pitka, is not evidence of the character or quantity required to rebut the prima facie case and inference of discrimination.

CONCLUSION

The petition for a writ of certiorari should be granted. The actions of Respondent and judgments of the lower courts are contrary to law. Respondent's failure to afford the Petitioner due process and its racially discriminatory

action in demoting Petitioner entitle Petitioner to damages and reinstatement to his former position in accordance with the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution, and 42 U.S.C. §§ 1981, 1983 et seq.

Respectfully Submitted,

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Dated June 5, 1985

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a full and correct copy of the foregoing Petition for Writ of Certiorari has been mailed, postage prepaid, to Counsel for Respondent, Mr. Gus Voltz, at his office address, 620 Murray Street, Alexandria, Louisiana, 71301.

Alexandria, Louisiana, this 5th day of June, 1985.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

CIVIL ACTION
NO. 82-2327

ISAAC HAMMOND
versus
RAPIDES PARISH SCHOOL BOARD

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NAUMAN S. SCOTT
UNITED STATES DISTRICT JUDGE

Plaintiff, a black principal in the Rapides Parish, Louisiana school system, brings this action pursuant to 42 U.S.C. §1981 and §1983 for injunctive and monetary relief. He alleges that the Rapides Parish School Board has administered the teacher tenure laws, La. R.S. 17:441, et seq., in a discriminatory fashion by demoting him from an elementary school principal to a classroom teacher at a reduced salary. As a result, he prays for monetary damages and other equitable relief. We have jurisdiction.

FINDINGS OF FACT

1. Isaac Hammond is a black citizen formerly employed by the Rapides Parish School Board as the Principal of Lincoln Road Primary School (Grades K-3) from 1971 until September 1982. During this

period, Mr. Hammond performed his duties satisfactorily and enjoyed a good reputation as an educator.

2. The Rapides Parish School Board is the administrative and governing body of the Parish school system. The Board is composed of six (6) white males, one (1) white female, and two (2) black males elected from districts within the parish. In addition, the Board has recently converted to a racially dual school system and currently operates under our desegregation order, Valley v. Rapides Parish School Board, 499 F.2d 49 (W.D. La.), rev'd and remanded in part, 646 F.2d 925 (5th Cir. 1980), opinion on rehearing, 653 F.2d 941.

3. During the 1981-82 school year, the Rapides Parish School Board imple-

mented a Pupil Progression Plan previously adopted by the Louisiana State Department of Education. This plan set forth the School Board's promotional policy. In part, it provided that students in Grades 1 thru 3 must pass the Rapides Parish Proficiency Test with seventy (70%) percent mastery in order to be promoted. Section II, Item 3, Para. (c) provides as follows:

> "c. Proficiency Test
>
> The students must pass with 70% mastery the Rapides Parish Proficiency Test effective Grades 1 thru 3 in the 1980-81 school year and in Grades 4 thru 6 in the 1981-82 school year."

In addition, students were required to meet reading level criteria by seventy (70%) percent proficiency on the Harper Row Mastery Test. Other requirements were passing grades and attendance. The

mastery test and the proficiency test are regarded as the most important criteria for promotion. (See Plaintiff's Exhibit II).

4. On September 22, 1981, Silverene Boss, Director of Elementary Education for Rapides Parish, sent a letter to all elementary school principals, including Mr. Hammond, which noted that a "pool of items" had been printed for the test. It urged principals to ensure that their students were drilled on these items in preparation for the test. She stated that "the Parish Proficiency Test <u>will be used as one of the criteria</u> for promotion for Grades 1 thru 6 during the 1981-82 school year." (Defendant's Exhibit 3, Memo #81-440) (emphasis in original). She also directed the principals to send a letter

to parents urging home instruction and attached a sample letter. It reades in pertinent part as follows:

> "Dear Parent, The Rapides Parish Proficiency Test will be administered to each student in Grades 1 thru 6 during the Spring. A passing grade on this test will be mandatory for promotion of Grades 1 thru 6 . . . ."

(Defendant's Exhibit 3, Memo #81-440, Attachment) (Emphasis added).

5. On December 1, 1981, Ms. Boss notified the elementary school principals that the parish test "will be administered to students in Grades 1 thru 6 during the first part of May 1982." Further, "all elementary students will be required to pass the proficiency test to be promoted." Ms. Boss enclosed an administrative manual, scoring key, and an answer sheet in her letter to assist in preparing the stu-

dents for the test. (Defendant's Exhibit 3, Memo #81-607).

6. On March 17, 1982, two additional memoranda were sent by Ms. Boss to elementary school principals. The first noted that the Parish tentatively scheduled the administration of the proficiency test on May 11, 12 and possibly 13. (Defendant's Exhibit 3, Memo #82-130). The second reminded the principals of the School Board's promotional policy, i.e., "students in Grades 1 thru 6 must pass the proficiency test" to be promoted. (Defendant's Exhibit 3, Memo #82-131).

7. All memoranda sent by Ms. Boss were directly approved by Allen E. Nichols, Superintendent of Schools, and Eugene Millet, Assistant Superintendent, and operated as directives from the School

Board. Workshop sessions for principals and teachers were also held to ensure understanding of the School Board's promotional policy. Mr. Hammond attended these meetings.

8. On May 12, 1982, the Parish Proficiency Exam was given to students at Lincoln Road Primary School. The tests were administered by special personnel without active participation by teachers or Mr. Hammond. However, several first grade students at Lincoln road Primary did not take the examination that day, even though they were present at the school.

9. Paula Turnage, a first grade teacher, had five or six students removed from her class at Mr. Hammond's direction prior to the administration of the test.

Shortly after the children came to Ms. Turnage's room, but before she called roll, Mr. Hammond appeared and instructed her to select those students from the class whom she felt could not pass the test. He further directed her to have her aide, Ms. Marcot, take them to the aide's room during the examination. Ms. Turnage followed Mr. Hammond's instructions and sent the children out of the room with Ms. Marcot. Later, Mr. Hammond appeared a second time and told her to mark those children whom she had selected as "absent", and to tell Ms. Davis, the testor, that these children were not present. He stated that the school had a high average on the exam, and if these children (who may have been destined to fail) had taken the test, it would bring the

school's average down. Ms. Turnage again followed Mr. Hammond's instructions and told Ms. Davis the children were absent. Ms. Davis later reported their absence after administering the test to the remaining children.

10. Michelle Pitka, another first grade teacher, had two students removed from her classroom by an aide, Barbara Dorsey, pursuant to Mr. Hammond's directions. Ms. Dorsey came to Ms. Pitka's classroom on the morning of the exam and told her Mr. Hammond specifically required that two students, namely, Ramion Davis and Lloyd Allen, be absent when the test was given. Ms. Pitka did not question the instructions and complied. She later reported the incident to Ms. Cyrique, an assistant testor. The test was given to

the remaining children in Ms. Pitka's class.

11. The students who did not take the exam on May 12 were given an opportunity to take a makeup test at the Rapides Parish Instructional Resources Center on May 20, 1982. Mr. Hammond sent notices of the makeup test to parents of the absent children, including those students whom Mr. Hammond prevented from taking the test. Parents were to furnish their own transportation except as noted, (Plaintiff's Exhibit 13). Only two of the excluded students actually took the makeup test. The others did not take the test.

12. In early June 1982, Ms. Pitka went to the School Board office seeking a contract extension. During her visit, she

reported Mr. Hammond's conduct directly to Ms. Boss. Ms. Boss, though aware of the problem, decided to refer the matter to Mr. Millet. Ms. Pitka then told Mr. Millet about Mr. Hammond's behavior. Mr. Millet then relayed the allegations to Mr. Nichols, and he ordered an investigation.

13. During June and July, 1982, Mr. Millet, assisted by Richard Sasser, conducted interviews with witnesses and consulted Gus Voltz, an Assistant District Attorney, about the possibility of bringing formal charges against Mr. Hammond for violation of School Board policies.

14. On August 5, 1982, an informal meeting was held at Mr. Nichols' office concerning the allegations of misconduct against Mr. Hammond. Messrs. Nichols,

Millet, Sasser and Hammond were present. Mr. Nichols confronted Mr. Hammond with the allegation that he purposely caused the removal of students from classrooms prior to the proficiency test. Mr. Nichols also questioned Mr. Hammond about whether he had used instructional funds to offset a lunchroom deficit. Mr. Hammond admitted misappropriating funds but strenuously denied intentionally removing students to avoid their testing.

15. On August 10, 1982, the Superintendent recommended that Mr. Hammond be dismissed as principal of Lincoln Road Primary School on charges of willful neglect of duty and incompetence. The charges were based on the alleged misappropriation of funds and the intentional removal of students prior to the profic-

iency exam. By letter dated August 11, 1982, Mr. Nichols informed Mr. Hammond of the charges against him. (Plaintiff's Exhibit 2).

16. On September 9, 1982, a public hearing was held before the School Board. It began at approximately 5:00 o'clock p.m. and continued through the early morning hours. Evidence was taken, and arguments were heard. Mr. Hammond vigorously denied he removed any students. At the same time, Mr. Hammond asserted that he interpreted Board policy not to require that every student be tested, but only those students who are promoted. It was argued that he gave the "absent" students the opportunity to make up the test and therefore ultimately complied with the policy on testing. Mr. Hammond expressed

his belief that young children should not be tested, and the Board's policy on testing was wrong.

17. The charge of misappropriation of instructional funds was dismissed. However, by a vote of six (6) to three (3), the School Board found Mr. Hammond guilty of "incompetence and willful neglect of duty for the reason that he intentionally violated School Board policy by removing, or causing to be removed, several students from one or more classrooms so as to purposely avoid the parish proficiency testing of those pupils." The School Board thereupon suspended Mr. Hammond with pay until September 13, 1982, at which time the "permanent penalty will be fixed." (Plaintiff Exhibit 2).

18. The Minutes of the Board meeting

held on September 13, 1982, read in pertinent part as follows:

THE BOARD RECONVENED IN OPEN SESSION

"A motion was made by Mr. Louis V. Crenshaw and seconded by Mr. Douglas A. Jenkins that the Rapides Parish School Board adopt a resolution as follows:

R E S O L U T I O N

"We, the Rapides Parish School Board, have found Isaac Hammond guilty of incompetence and willful neglect of duty for the reasons that he intentionally violated School Board policy by removing, or causing to be removed, several students from one or more classrooms so as to purposefully avoid the parish proficiency testing of those pupils.

"Having thus found Isaac Hammond guilty as above stated, we do hereby remove him permanently as a principal in the Rapides Parish school system and order him placed as a

> classroom teacher in a proper position befitting his certification at a classroom teacher's salary schedule.
>
> "We further resolve that this action is to be effective immediately this 13th day of September, 1982."

The resolution was adopted on a roll call vote as follows:

> "AYE: Mr. Jenkins (white), Col. Duncan (white), Mrs. Kellogg (white), Mr. Crenshaw (white), Mr. Holloway (white), Mr. Farrar (white).
>
> "NAY: Mr. Williams, Mr. Joffrion, Mr. Martin (white)."

(Plaintiff's Exhibit 2) (Emphasis added).

20. On September 14, 1982, Mr. Nichols advised Mr. Hammond that he was assigned as a teacher to Alexandria Junior High School effective September 14, 1982. Mr. Hammond presently holds that position.

21. On August 3, 1982, this Court ordered that Freddie Banks, a black citizen and former principal of Lincoln Williams Elementary School, be assigned by the Rapides Parish School Board to the "next available position which approximates his former assignment." Freddie Banks v. Rapides Parish School Board, CA 81-0032-A, Ruling on plaintiff's Motion for Summary Judgment (W.D. La., Aug. 3, 1982). Mr. Banks had been displaced by the closing of his school under our desegregation order, but had continued his employment by the Board in a staff capacity. Valley, supra. Equitable relief was necessary to restore Mr. Banks to his former position. In compliance with our order in that case, the School Board assigned Mr. Banks as principal of Lincoln

Road Primary School. He presently holds that position.

22. On other occasions, the Superintendent has initiated investigations and/or disciplinary proceedings against six (6) white principals for alleged violations of School Board policy. Three (3) white principals accused of wrongdoing resigned following conference with the Superintendent rather than face formal charges and a hearing. Another white principal was charged and after a hearing was demoted by the Board to his original tenured position as an assistant principal of a high school. The record does not disclose the specific charges in each instance. Since the Hammond incident, two (2) white principals have been accused of malfeasance. Formal charges were brought

against Charles Thigpen, Principal of Rapides Parish High School, and an informal investigation of Jerry Gill, Principal of Martin Park Elementary School, was conducted as a result of administrative irregularities.

23. On March 2, 1983, following Mr. Hammond's demotion, Mr. Nichols recommended that Charles Thigpen be removed as principal because of willful neglect of duty and incompetence. Mr. Nichols alleged that Mr. Thigpen "has not only permitted, but directed a teacher under his supervision to violate School Board policy by copying copyrighted music." Mr. Thigpen admitted authorizing his music teacher to copy music. He also expressed an intent to continue the practice so long as no funds were available

to purchase needed music. (Plaintiff Exhibit 3). Mr. Thigpen waived his right to a public hearing and asked for a private hearing at the earliest possible date. A hearing was held on the charges, and the Board passed a motion by its President:

> "I move that in light of the admission of willful neglect of duty by failing to follow the directives of the School Board by Mr. Charles Thigpen and his proper attitude concerning the situation, that a letter of reprimand be placed in his file. The letter should read that 'this is to officially notify Mr. Charles Thigpen of reprimand by the Rapides Parish School Board for failing to follow a directive of the Superintendent of Schools. Be it further understood that willful failure to comply with Board policy by Mr. Thigpen in the future would result in his immediate dismissal.' (Plaintiff Exhibit 5)."

24. The incident involving Mr. Gill concerned whether a student, Tiffany

Hayes, had been promoted without having taken the Harper Row Mastery Level Test. Tiffany Hayes, a first grade student at Martin Park, was promoted and transferred to Lincoln Road Primary. Mr. Hammond, the principal at Lincoln Road, discovered that Tiffany did not have any record in her file indicating that she took the mastery test. An investigation was conducted by the School Board office. The Board determined that Tiffany's teacher was responsible for the oversight. No charges were brought against Mr. Gill as a result of this incident.

25. There is no evidence that the School Board has brought any action against any black principal before or since the Hammond incident.

26. Since Mr. Hammond's demotion,

the School Board appointed Mr. Thompson, a black citizen, as principal of Rosenthal Elementary School to replace Mr. Long, a white. In doing so, the School Board rejected white applicants on the basis of merit in favor of a black. See Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969) en banc), rev'd in part on other grounds sub nom, Carter v. West Feliciana Parish School Board, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 (1971).

CONCLUSIONS OF LAW

It is well established that a claim of racial discrimination under §1981 and §1983 may be analyzed under the standards developed in Title VII actions. Lee v. Russell County Bd. of Education, 684 F.2d

769, 773 (11th Cir. 1982); McWilliams v. Escambia County School Bd., 658 F.2d 326, 331-32 (5th Cir. 1981). In a Title VII action, the plaintiff bears the burden of estabishing a prima facie case of unlawful discrimination by a preponderance of the evidence. If the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant to "articulate some legitimate non-discriminatory reason for the employee's rejection." McDonnell-Douglas Corp. v. Greene, 411 U.S. 782, 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Finally, should the defendant meet this burden, the plaintiff must have an opportunity to prove by a preponderance of the evidence that the proffered explanation was not the true reason for the employment decision, but served as a pretext for dis-

crimination. Id. U.S. at 804-805, 93 S.Ct. 1817, 36 L.Ed.2d 668.

With this framework in mind, we consider first whether the plaintiff established a prima facie case of racial discrimination. The McDonnell-Douglas test, as modified for application in discharge cases, requires that the plaintiff prove: (1) he is a member of a protected class; (2) he was qualified for the position held; (3) he was discharges; and (4) he was replaced by a person outside of the protected class with lesser or equal qualifications. See Lee, supra, at 773; Jackson v. City of Killeen, 654 F.2d 1181, 1183-84 (5th Cir. 1981).

In this case, the plaintiff is a black citizen and a member of a protected class. Without question, Mr. Hammond was quali-

fied for the position which he held and he was discharged. Although Mr. Hammond was replaced by a member of the same class with equal or lesser qualifications, this fact is not significant. As stated by the Supreme Court, the prima facie method "was never intended to be rigid, mechanic, or ritualistic." Furnco Construction Co. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed. 2d 957 (1978). Proof that the defendant failed to fill the vacant position with a non-minority is not necessary in all cases of alleged discrimination. Jackson, supra. In replacing the plaintiff, the School Board simply complied with our Judgment in Freddie Banks v. Rapides Parish School Board, supra. In this circumstance, we find that the plaintiff has established a prima facie

case, even though he was replaced by a black citizen.

Having found that the plaintiff has established a prima facie case, a presumption arises that the defendant administered the teacher tenure laws in a discriminatory fashion. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). As stated above, the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for the employee's demotion. In the usual Title VII action, the defendant's burden is not onerous. The defendant can rebut the presumption by submitted evidence "sufficient to raise a genuine issue of fact. Id." U.S. at 255 and n. 8, 101 S.Ct. 67 L.Ed.2d 207. (emphasis added).

However, in actions under §1981 and §1983 against school authorities with an immediate history of racial discrimination, the sufficiency of evidence required to rebut plaintiff's prima facie case may be greater.

In §1981 and §1983 cases decided prior to Burdine, the Fifth Circuit held that where the defendant has an immediate past history of racial discrimination, such as a school district operating under a Federal injunction ending a recent regime of de jure segregation, the defendant bears a burden of persuasion requiring proof of clear and convincing evidence. Lee v. Conecuh County Bd. of Education, 634 F.2d 959 963 (5th Cir. 1980); Lee v. Washington County Bd. of Education, 625 F.2d 1235, 1237 (5th Cir. 1980). Accord,

Hardy v. Parker, 613 F.2d 112, 113 (5th Cir. 1980). Since Burdine, it is unclear whether this rule has been modified or altered by the clarification of the defendant's burden in a Title VII action. See, e.g., McWilliams, supra, at 331-32, fn. 2. In our view, the pre-Burdine cases cited above are erroneous insofar as they shift the burden of persuasion to the defendant once plaintiff has proven a prima facie case of racial discrimination. The plaintiff always has the burden of proving his case. Burdine, supra, U.S. at 215, 101 S.Ct. 1089, 67 L.Ed.2d 207, citing J. Wigmore, Evidence §2489 (3rd ed. 1940) (The burden of persuasion "never shifts"). On the other hand, there may be valid reason for imposing a heavier evidentiary burden on elected school auth-

orities operating under a desegregation order than on private employers under Title VII. However, we do not decide this question of law, because we are satisfied that the defendant has offered sufficient evidence to carry this burden as well as the burden to create a genuine issue of fact.

Thus, it is our function to address the ultimate factual issue: Whether there was intentional discrimination vel non against the plaintiff in violation of his right to equal protection of the laws.

> "On this issue, the plaintiff has the burden of persuasion, which [he] may meet 'either directly by persuading the court a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's profferd explanation is unworthy of credence.' In either case, the trier of fact

> must then determine which explanation, employer's or employee's, is more persuasive."

Williams v. Southwestern Bell Telephone Co. 718 F.2d 715, 717-18 (5th Cir. 1983).

Here plaintiff contends that the school board has administered the teacher tenure laws in a discriminatory fashion; that the Board's decision to demote him was tainted by racial factors, because white principals received more favorable treatment in similar cases of misconduct; that the bringing of charges and the finding of guilt were a pretext to remove him as principal because he was black; and that his discharge was engineered to create a vacancy so that Freddie Banks could be restored to his former position as a principal.

We find that plaintiff has dismally failed to establish that the Board was motivated by a discriminatory reason or that the Board's explanation of its demotion of the plaintiff was unworthy of credence. We find the explanation of the defendant is clear and reasonably specific, see Redditt v. Mississippi Extended Care Center, 718 F.2d 1381 (5th Cir. 1983), and it has met its burden of production. Plaintiff was properly demoted, having been found guilty of willful neglect of duty and incompetence: the removal of several students from the two classrooms to avoid their testing in violation of Board policy. Plaintiff has utterly failed to establish that white principals received more favorable treatment in similar cases of misconduct, or

that the finding of guilt was a pretext to removal of him because he was black, or that his discharge was engineered to create a vacancy for the appointment of Freddie Banks:

(1) The record reflects three instances of investigations initiated by the Board for misconduct by white principals. In these three cases, the white principals resigned rather than face formal charges and a hearing on their recommended dismissal.

(2) On another occasion, a white principal was formally charged, hearing was had, and he was demoted to be assistant principal at Oak Hill High School.

(3) There is not one instance of disciplinary charges having been brought against any black principal prior to the

charges in plaintiff's case.

(4) There is a complete absence of evidence establishing that any principal, including the plaintiff, was empowered to exempt, at his own discretion, any student or students from taking the test. Plaintiff did not produce one witness or principal who stated that he exercised or knew any other principal who exercised such power. On the contrary, we find that the letters issued by Ms. Boss, from testimony regarding the workshop, from the testimony of Mr. Gill, a white principal, the testimony of Mr. Christophe, a black principal, and from the covert manner in which plaintiff prevented several students in his school (who were present to take the test) from taking the test, that plaintiff knew that he had no such authority).

Considering the above, we find that the policy of the Board was that all children present on the day of testing were to be given the test; that plaintiff was well aware of this policy; and that he purposely and deliberately prevented students present on the day of testing from taking the test. There is no doubt that the rating of plaintiff's school would be improved by exempting poorer students from taking the test, thus improving plaintiff's record of performance.

Plaintiff's excuse that parents of these 7 or 8 absentees were given notice of the makeup examination is unconvincing. All of these students were present on the day of testing, and if Board policy had been followed, all of them would have been tested. In this case, only two took

the makeup examination.

(5) Plaintiff stated repeatedly at the hearing that he disagreed with the Board's policy of testing. At one point in his testimony, he would deny that he removed the students; moments later he would state that he would do it again because he did not agree with the policy. Plaintiff's attitude toward the Board was defiant and betrayed a complete lack of discipline or a sense of loyalty toward the Board or Board policy which would be expected of a principal.

(6) Plaintiff, in his defense and in an attempt to demonstrate discrimination, charged that a second grade student, Tiffany Hayes, had been promoted from the first grade in Martin Park Elementary and transferred to Lincoln Road Elementary

without taking the mastery test. No charges had been brought by the Board against the white principal, Mr. Gill, for failure to administer the test to Tiffany Hayes. The only evidence available discloses that Tiffany Hayes did not take the test and that the teacher and the school staff responsible for making the record could not explain its absence. There is not one iota of evidence that principal Gill knew of the error or had any part in the making of the error. Principal Gill testified that he knew the policy of the Board regarding the taking of the test and that it was enforced in Martin Park Elementary. In this case, there was no evidence of any irregularity other than the misplacement of the record of the test. This could hardly constitute

a case for charges against Mr. Gill and certainly has no similarity to the deliberate actions of plaintiff.

(7) After completion of the School Board hearing and prior to the hearing on this suit, the School Board brought charges against Mr. Charles Thigpen, a white principal at Rapides High School. See ¶23 above. The Thigpen investigation and charges bear little resemblance to the charges against plaintiff for preventing the testing of students. They are far more similar to the charges against plaintiff for misdirecting funds. The action of the principal in both cases involved a minor infraction which was motivated on behalf of the students without any selfish purpose. In both cases, the principal admitted the infraction. Thigpen, the

white principal, received a reprimand. Plaintiff, the black principal, was acquitted.

(8) During the same period the Board, following its official criteria, rejected a number of white applicants and appointed a black applicant to replace Mr. Long, a white, as principal of Rosenthal Elementary School.

(9) Plaintiff was given an extensive hearing (public at his request) which commenced at 5:00 o'clock p.m. and continued through the early morning hours of the next day. He had every opportunity to call witnesses and produce evidence to defend himself against the charges. It is principally on the evidence at that hearing that we have come to our conclusions on this matter. Although he denied

the Board's charges of excluding students from the taking of the test, he at other times declared his opposition to the policy and his "right" to violate it. Although he repeatedly charged the Board with discrimination against black principals, there is no testimony from any other black principal and not one other instance in the record to support such charges. We find that the Board correctly acquitted him of the admitted charge of misapplication of funds and found him guilty of the violation of the School Board policy regarding the testing of students. Plaintiff has failed to show that the action of the Board, considering his actions and his attitude, were discriminatory.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

ISAAC HAMMOND

-vs-

CIVIL ACTION
:No. 82-2327

RAPIDES PARISH SCHOOL BOARD

J U D G M E N T

For written reasons this day assigned, it is

ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendant, RAPIDES PARISH SCHOOL BOARD, and against plaintiff, ISAAC HAMMOND; that plaintiff take nothing by this suit and that the same be DISMISSED at his cost.

Alexandria, Louisiana, this 23rd day of July, 1984.

UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4545

Summary Calendar

ISAAC HAMMOND,

Plaintiff-Appellant,

versus

RAPIDES PARISH SCHOOL BOARD,

Defendant-Apppellee

Appeal from the United States District Court for the Western District of Louisiana

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(February 11, 1985)

Before REAVLEY, POLITZ, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

After the Rapides Parish School Board demoted Isaac Hammond from principal to teacher, he filed this action under 42 U.S.C. §§ 1981 and 1983, charging that he

was demoted because he was black. After a bench trial, the district court held that Hammond had been demoted for violating school board policy, and not because of his race. Because the decision below was not clearly erroneous, we affirm.

In 1981, the Rapides Parish School Board adopted a Pupil Progression Plan, under which, among other things, all students in grades one through three had to pass a year-end proficiency examination to be promoted. On May 12, 1982, that test was given to first graders at Lincoln Road Primary School, where Hammond was principal. Paula Turnage, a first-grade teacher at Lincoln Road, testified that Hammond came to her classroom shortly before the test, asked her to identify those students whom she thought would not

pass, and told her to send them out of the room and to inform the tester that they were absent. When Turnage asked why, Hammond said that the excused students would lower the school average if they took the test. Another first-grade teacher, Michelle Pitka, testified that a teacher's aide, Barbara Dorsey, came to her classroom that day, told her that Hammond had specifically directed that two of her students be excused, and took the two from the classroom.

In August of 1982, School Superintendent Allen Nichols brought formal charges against Hammond before the School Board. Nichols, in addition to citing the testing incident, accused Hammond of improperly transfering funds from one school account to another. After a lengthy pub-

lic hearing on September 9, at which Turnage and Pitka testified, the School Board voted to dismiss the funds charge, but found Hammond "guilty of incompetence and willful neglect" for directing the exclusion of students from the examination. The Board demoted Hammond, who now teaches a junior high school class. Freddie Banks, who is black, replaced Hammond as principal at Lincoln Road.

Hammond points to no error in the district court's discussion and application of the law of racial discrimination. He contends that the court came to the wrong conclusion on the facts. He complains that the court should not have believed Turnage and Pitka, should have found that Gill withheld a student from the exam without being punished, and

should have held that the Board's failure to demote Thigpen reflected discrimination. The lower court's contrary conclusions, along with its ultimate finding that the Board did not discriminate, must stand unless clearly erroneous. Pullman-Standard v. Swint, 456 U.S. 273 (1982). Our reading of the record persuades us that the district court's findings are not clearly erroneous. We therefore affirm.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4545

ISAAC HAMMOND,

Plaintiff-Appellant

versus

RAPIDES PARISH SCHOOL BOARD,

Defendant-Appellee

Appeal from the United States District Court for the Western District of Louisiana

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 2/11/85, 5th Cir. 198_____,

_____ F.2d _____)

Before REAVLEY, POLITZ, and HIGGINBOTHAM,

Circuit Judges

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate

Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX D

L.S.A.-R.S. 17:443.

Removal of teachers; procedure; right to appeal.

A. A permanent teacher shall not be removed from office except upon written and signed charges of willful neglect of duty, or incompetency or dishonesty, or of being a member of or contributing to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the state of Louisiana, and then only if found guilty after a hearing by the school board of the parish or city, as the case may be, which hearing may be private or public, at the option of the teacher. At least twenty days in advance of the date of the hearing, the superintendent with approval

of the school board shall furnish the teacher with a copy of the written charges. Such statement of charges shall include a complete and detailed list of the specific reasons for such charges and shall include but not be limited to the following: date and place of alleged involved in or witnessing such offense or offenses, names of of witnesses called or to be called to testify against the teacher at said hearing, and whether or not any such charges previously have been brought against the teacher. The teacher shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of whom shall be heard by the board at said hearing. For the purpose of conducting hearings hereunder the board shall have

the power to issue subpoenas to compel the attendance of all witnesses on behalf of the teacher. Nothing herein contained shall impair the right of appeal to a court of competent jurisdiction.

B. If a permanent teacher is found guilty by a school board, after due and legal hearing as provided herein, on charges of willful neglect of duty, or of incompetency, or dishonesty, or of being a member of or contributing to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the state of Louisiana, and ordered removed from office, or disciplined by the board, the superintendent with approval of the board shall furnish to the teacher a written statement of recommendation of removal or discipline,

which shall include but not be limited to the exact reason(s), offense(s) or instance(s) upon which the recommendation is based.